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No. 95-831

In the Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY, ET AL., PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an American labor union violated the secondary boycott provisions of the National Labor Relations Act through its communications with Japanese unions that threatened to refuse to unload in Japan cargo that had been loaded in the United States by nonunion labor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 56 F.3d 205. The decision and order of the National Labor Relations Board (Pet. App. 24a-47a) are reported at 313 N.L.R.B. 412.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995. Petitions for rehearing were denied on August 30, 1995. Pet. App. 48a-49a. The petition for a writ of certiorari was filed on November 28, 1995. The jurisdiction of this Court is invoked under 29 U.S.C. 1254(1).

STATEMENT

1. Japan is a major importer of Florida citrus fruit. Before the events at issue in this case, fruit had been shipped to Japan from Ft. Pierce and Port Canaveral, Florida, where it was loaded by employees of petitioners Coastal Stevedoring Company and Port Canaveral Stevedoring, Ltd. Upon arrival in Japan, the fruit was unloaded by Japanese stevedores. Petitioners' employees were not represented by a union, and respondent the International Longshoremen's Association (ILA) had been engaged in labor disputes with petitioners over their failure to hire union-represented employees. Pet. App. 5a, 27a.

Prior to the 1990-1991 citrus export season, ILA representatives visited Japan and met with representatives of several Japanese unions to request assistance from them in preventing the use of nonunion stevedores at Ft. Pierce and Port Canaveral. The Japanese unions responded by asking Japanese stevedoring companies, citrus importers, and shipping companies to ensure that all the citrus fruit they imported was loaded in Florida by stevedoring companies that hired union-represented employees. The Japanese unions also warned that their dockworker members would not unload fruit that had been loaded with nonunion labor. Pet. App. 5a-6a, 28a-29a.

In October 1990, ILA President John Bowers wrote to the Japanese unions to tell them that the ILA was planning to picket nonunion stevedoring companies at Ft. Pierce and Port Canaveral, and to ask for their support. The letter stated that the support of the Japanese unions "in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the

International Longshoremen's Association and organized labor in the United States which supports our effort." The Japanese unions circulated copies of Bowers' letter to citrus importers, exporters and shipping companies. As a result, Japanese importers expressed concern to exporters that fruit loaded by nonunion longshoremen in Florida would not be unloaded by Japanese longshoremen. Pet. App. 6a, 29a.

In late October 1990, after failing to obtain assurances that Japanese dockworkers would unload fruit loaded by nonunion stevedores, one Japanese importer and its carrier redirected a ship from Ft. Pierce to Tampa so that it could be loaded by union longshoremen. An ILA representative wrote to the Japanese unions that the diversion was "a direct result of your very timely and effective notices to relevant parties in Japan of your support for our efforts." He added that the unions' "continued efforts on our behalf will be most appreciated." Pet. App. 6a-7a, 29a-30a.

During December 1990, several other Japanese importers informed various American exporters that their ships would be loaded at Tampa instead of Port Canaveral because of the threats made by the Japanese unions. Ultimately, those threats caused all Japan-bound citrus fruit to be shipped through Tampa, and none through Ft. Pierce or Port Canaveral, during the 1990-1991 export season. Pet. App. 7a, 30a.

2. In November and December of 1990, petitioners filed unfair labor practice charges against the ILA, alleging that it had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C.

158(b)(4)(ii)(B).[1] The National Labor Relations Board's General Counsel, finding reasonable cause to believe that the charges were true, issued a complaint, and, pending a final determination by the Board, sought and obtained from a district court, under 29 U.S.C. 160(*l*), an injunction directing the ILA to refrain from threatening persons neutral to the primary labor dispute and to repudiate its written request soliciting aid from the Japanese unions. *Dowd* v. *International Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991), aff'd, 975 F.2d 779 (11th Cir. 1992).

After considering the General Counsel's complaint, the Board held that the ILA, acting through the Japanese unions, had violated Section 8(b)(4)(ii)(B) of the Act. The Board explained that "[b]eyond question, the [ILA] attempted to cause economic pressure to be brought to bear against neutral shippers, importers, and exporters involved in the Florida-Japan citrus trade in order to further the [ILA's] primary dispute with nonunion stevedoring

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[1] Section 8(b) provides in relevant part that:

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person[.]

companies in Florida." Thus, "[t]he only aspects of this case which remove it from a textbook scenario of 8(b)(4)(ii)(B) conduct [are] (1) the involvement of foreign entities and (2) the exertions of economic pressure outside U.S. Territory." Pet. App. 34a. The Board found that neither unusual factor was sufficient to insulate the ILA from the proscriptions of Section 8(b)(4)(ii)(B).

The Board acknowledged that ILA's request to the Japanese unions, standing alone, was not unlawful, and that all of the allegedly unlawful threats to boycott cargo loaded by nonunion labor were made "solely by the Japanese unions." Pet. App. 32a, 42a n.17. The Board concluded, however, that the ILA was responsible for those threats under the principles of agency enunciated in *Pipefitters Local 280 (Aero Plumbing Co.)*, 184 N.L.R.B. 398 (1970), enforced *sub nom. NLRB* v. *Southern California Pipe Trades Dist. Council No. 16*, 449 F.2d 668 (9th Cir. 1971).[2] Thus, the Board found that by informing the Japanese unions of its dispute with the nonunion stevedoring companies, requesting supportive action, and then applauding that action and requesting its continuation, the ILA had authorized and ratified the conduct of the Japanese unions. Pet. App. 35a-36a.

The Board further concluded that in this case its jurisdiction extended to consideration of conduct occurring outside the territory of the United States.

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[2] In *Aero Plumbing*, when an employer refused to accept a contract proposal made by Pipefitters Local 280, the local union requested that Pipefitters Local 78, in whose jurisdiction the employer was then working, help get the employer to sign the contract. Local 78 then picketed the employer's jobsite in its jurisdiction. On those facts, the Board concluded that Local 280 was responsible for Local 78's unlawful conduct.

The Board explained that "[a]ssertion of jurisdiction in this case in no way interferes with the laws of Japan or affects the employment conditions of Japanese employees. Our remedial Order simply requires that the [ILA] cease and desist from requesting that the Japanese Unions engage in secondary boycott activities in support of the [ILA]." Pet. App. 41a-42a.

3. The court of appeals denied enforcement of the Board's order. Pet. App. 1a-23a. The court based its decision solely on its conclusion that the ILA was not responsible for the threats made by the Japanese unions. Because that conclusion resolved the case, the court declined to address the question whether the Board had jurisdiction under the Act to examine actions taken in Japan by Japanese unions. *Id.* at 10a.

The court held that because questions of agency under the Act turn on common law rules of agency, it would accord only limited deference to the Board's own agency analysis. Pet. App. 14a-15a. While the court indicated that it would uphold the Board's analysis if it reflected "a choice between two fairly conflicting views" (*id.* at 16a), it concluded that in this case the Board's analysis disregarded the "fundamental principle of hornbook agency law that an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Ibid.* (quoting Restatement (Second) of Agency § 14 (1958)). In the court's view (Pet. App. 17a):

> Here, ILA exercised no control over the conduct of the Japanese unions. To the contrary, the ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the

> goals of organized labor worldwide. We discern nothing in the law of agency to support a theory transforming one union into the agent of another based upon the spirit of labor solidarity alone.

The court acknowledged that the Eleventh Circuit had reached a contrary conclusion in the earlier injunction proceeding in this case, but it noted that in that proceeding the court of appeals was required to find only that the Board had articulated "a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese unions to ILA." Pet. App. 7a. In this case, by contrast, the court below viewed the appropriate standard of review as essentially de novo. *Id.* at 14a-15a. The court distinguished the *Aero Plumbing* case on the ground that the two unions involved in that case were formally affiliated and bound by a common collective bargaining agreement, a relationship "far closer than that existing between the Japanese unions and the ILA." Pet. App. 18a. Similarly, the court held (*id.* at 19a-20a) that cases holding employers responsible for the actions of employees and others during anti-union campaigns were inapposite because, in those cases, "under all the circumstances, employees *reasonably* could have believed that such third parties were acting for and on behalf of the employer" (*id.* at 20a). In the court's view, "nothing in the record [in this case] suggests that any party perceived the Japanese unions to be the agents of the ILA, nor that such a perception would have been reasonably justified had it arisen." *Id.* at 21a.

The court accordingly concluded that "the Board erred in attributing the actions of the Japanese

unions to the ILA for the purpose of an unfair labor practice finding under NLRA section 8(b)(4)(ii)(B)." Pet. App. 22a. The court remanded the case to the Board "for further proceedings consistent with [the court's] opinion." *Id.* at 23a.

DISCUSSION

Section 8(b)(4)(ii)(B) of the Act (see note 1, *supra*) makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce" with the aim of forcing that person "to cease handling * * * or otherwise dealing in the products of any other producer." In this case, Japanese unions threatened to boycott the products of neutral shippers, importers, and exporters involved in the Florida-Japan citrus trade, in order to further the ILA's primary dispute with nonunion stevedoring companies in Florida. That conduct would clearly have violated Section 8(b)(4)(ii)(B) had it been engaged in by an American union in the United States. See, *e.g.*, *International Longershoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212 (1982). Because the threats in this case were made by Japanese unions outside the United States, however, they violated Section 8(b)(4)(ii)(B) only if they are properly attributable to the ILA, and if the Act has at least limited extraterritorial effect.

The National Labor Relations Board in this case determined both that the Japanese unions should be treated as agents of the ILA for purposes of the Act, because the ILA authorized and ratified their actions, and that the Act's proscriptions applied, on the facts of this case, notwithstanding that the threats themselves were made outside the territorial juris-

diction of the United States. The court of appeals rejected the Board's conclusion on the first issue, and did not reach or resolve the second.

The Board believes that the court of appeals should have accorded greater deference to the Board's conclusion that an agency relationship existed on the facts of this case. See generally, *e.g.*, *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453, 455 (1995). The Board did not seek certiorari in this case, however, in light of the following considerations. In the Board's view, the facts of this case are unusual; and the decision below does not fully address even those facts, because the court of appeals declined to reach any question of extraterritorial jurisdiction. The court of appeals found various cases relied on by the Board in reaching its decision to be distinguishable from this case on their facts (see Pet. App. 17a-21a); and, as petitioners acknowledge (Pet. 22), the Eleventh Circuit's decision upholding the Board's request for a preliminary injunction (*Dowd* v. *International Longshoremen's Ass'n*, 975 F.2d 779 (1992)) held only that the Board had articulated "a substantial and not frivolous legal theory upon which to attribute the actions of the Japanese unions to ILA" (*id.* at 784). There is accordingly no clear conflict among the circuits on the facts of this particular case.

If the decision below does prove to have the "far-reaching implications for U.S. trade and labor relations policy" foreseen by petitioners (Pet. 23), that development will become evident through future cases, in which the Board and the lower courts can give further consideration to the legal issues involved

as they arise in concrete factual settings. A more appropriate occasion for review of the matter by this Court might then present itself.

Respectfully submitted.

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